

No. 12266

IN THE
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

W. P. JAEGER, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona,	}	<i>Appellant,</i>
vs.		
MOSES D. SIMRANY,		
		<i>Appellee.</i>

Upon Appeal from the United States District Court
for the District of Arizona.

BRIEF FOR THE APPELLEE

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JURISDICTION

This appeal involves a suit instituted against W. P. Jeager, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona. The amended complaint was filed October 21, 1948.

The appellee has brought his action in the District Court pursuant to the provisions of Title 28 U.S.C.A., Section 2201 and Title 28 U.S.C.A., Section 131 and Titles U.S.C.A., Section 1009, and seeks a declaratory

judgment to establish the right of the appellee to retain without molestation a certificate of lawful entry and to restrain the appellant from cancelling or attempting to cancel the record of registry and certificate of lawful entry issued to the appellee pursuant to the provisions of Title 8 U.S.C.A., Section 728. The value of the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interests and costs.

Neither Title 8 U.S.C.A., Section 740 nor any other provisions of law confer upon the Commissioner of Immigration and Naturalization authority to adopt the provisions of Part 385, Title 8 of the Code of Federal Regulations for cancellation of a record of registry and a certificate of lawful entry, nor upon the appellant the authority to cancel said record of registry and revoke said certificate of lawful entry or do any act or thing in connection with the cancellation thereof.

There is no procedure for administrative review of the appellant's action in promulgating a regulation referred to as Part 385, Title 8 of the Code of Federal Regulations, which regulation is unlawful and beyond the power of the Commissioner of Immigration and Naturalization to adopt insofar as said regulation applies to a record of registry and certificate of lawful entry.

The appellee, an alien, arrived in the United States prior to July 1, 1924. No record was made of his arrival, so he applied for registry of arrival in the United States pursuant to the provisions of Section 728(b), Title 8 U.S.C.A. Upon this application a record of registry was entered and a certificate of

lawful entry was issued to appellee on April 17, 1941.

Claiming that the certificate of lawful entry and record of registry were procured by false statements, the appellant ordered appellee to appear before him and show cause why said record of registry and certificate of lawful entry should not be cancelled (Plaintiff's complaint, T.R. 4). This action on the part of appellant was pursuant to the procedure specified by the Commissioner of Immigration and Naturalization under authority of Part 385 of Title 8 C.F.R. and Section 740, Title 8 U.S.C.A. (T.R. 4).

The appellant is acting pursuant to the provisions of Title 5 U.S.C.A., Section 1004 and conducting a proceeding to cancel appellee's record of registry and certificate of lawful entry, and has been designated under said section to conduct the hearing which is an essential part of such cancellation proceeding; in the event that the appellant is allowed to proceed with said hearing, said record of registry and certificate of lawful entry may be cancelled; that if said certificate is cancelled the appellee will be irreparably damaged in that he will be deprived of his right to obtain the certificate of arrival required by Title 8 U.S.C.A., Section 732(c), to be filed with a petition for naturalization and which must be obtained by the appellee before he can file such a petition; that by preventing the appellee from filing such a petition for naturalization he will be deprived of his right to have the court pass upon his qualifications for citizenship.

The amended complaint and the proffered amendments thereto appearing in the transcript at pages 11 and 12 and recognized by the trial judge in his

opinion and judgment, after setting out the above facts, prays for a decree:

1. That the defendant has no right under any law of the United States to cancel the record of registry and to revoke the certificate of lawful entry; and

2. That the defendant be restrained from proceeding with a revocation or cancellation proceeding pursuant to the provisions of Part 385 of Title 8 C.F.R. (T.R. 5); and

3. That the defendant be restrained from conducting any hearing as a part of any proceeding to revoke the plaintiff's record of registry and Certificate of Lawful Entry; and

4. That the Court declare that the defendant has no right under any law of the United States to conduct a hearing as a part of a proceeding to cancel the plaintiff's record of registry and Certificate of Lawful Entry.

The appellant interposed a motion to dismiss the complaint on the ground that no controversy existed between the parties, and that the superior officer, namely, the Commissioner of Immigration and Naturalization (in this brief hereinafter referred to as Commissioner), having power to decide, was a necessary party (T.R. 6). The motion to dismiss was denied February 9, 1949 (T.R. 26), in a written memorandum opinion by the trial judge (T.R. 23) and judgment was entered March 18, 1949, restraining the appellant from conducting any hearing as a part of any proceeding to revoke the record of registry and certificate of lawful entry (T.R. 31).

Notice of appeal was timely filed May 13, 1949, pursuant to the provisions of Section 2107, Title 28 U.S.C.A. (T.R. 32). This Court has jurisdiction by virtue of the provisions of Section 1291, Title 28 U.S.C.A.

STATUTES INVOLVED

Title 8 U.S.C.A., Section 210 (a)(b), provides that:

“Any alien about to depart temporarily from the United States may make application to the Commissioner of Immigration and Naturalization for a permit to reenter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations prescribed, and shall be accompanied by two copies of the applicant's photograph.”

“If the Commissioner of Immigration and Naturalization finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Secretary of Labor, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matter as may be deemed necessary for the complete identification of the alien.”

Title 8 U.S.C.A., Section 155, provides that:

“At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. . .”

Title 8 U.S.C.A., Section 214, provides that:

“Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this subchapter to enter the United States, or to have remained therein for a longer time than permitted under this subchapter or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in section 155 and 156 of this title. . .”

Title 8 U.S.C.A., Section 727 (b), provides that:

“The commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this chapter (Sections 701 to 747 of this title) and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States.”

Title 8 U.S.C.A., Section 728 (a) (b) (c), provides

that:

“The Commissioner shall cause to be made, for use in complying with the requirements of this chapter (Sections 701 to 747 of this title), a registry of each person arriving in the United States after the effective date of this Act, of the name, age, occupation, personal description (including height, complexion, color of hair and eyes, and fingerprints), the date and place of birth, nationality, the last residence, the intended place of residence in the United States, the date and place of arrival of said person, and the name of vessel or other means of transportation, upon which said person arrived.”

“Registry of aliens at ports of entry required by subsection (a) of this section may be made as to any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the Commissioner, in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, that such alien—

- (1) Entered the United States prior to July 1, 1924;
- (2) Has resided in the United States continuously since such entry;
- (3) Is a person of good moral character; and
- (4) Is not subject to deportation.”

“For the purposes of the immigration laws and naturalization laws an alien, in respect of whom a record of registry has been made as authorized by this section, shall be deemed to have been law-

fully admitted to the United States for permanent residence as of the date of such alien's entry."

Title 8 U.S.C.A., Section 729 (a), provides that:

"The certificate of arrival required by this chapter (Sections 701 to 747 of this title) may be issued upon application to the Commissioner in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, upon the making of a record of registry as authorized by section 328 of this Act (Section 728 of this title)."

Title 8 U.S.C.A., Section 732 (c), provides that:

"At the time of filing the petition for naturalization there shall be filed with the clerk of court a certificate from the Service, if the petitioner arrived in the United States after June 29, 1906, stating the date, place, and manner of petitioner's arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition."

Title 8 U.S.C.A. 734(a) provides: "Except as provided in sub-section (b) of this section, every final hearing upon a petition for naturalization shall be had in open court before a judge thereof . . ."

Title 8 U.S.C.A., Section 738 (a), provides that:

"It shall be the duty of the United States district attorneys for the despective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 (Section 701 of this title) in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling

the certification of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

Title 8 U.S.C.A., Section 740, provides that:

"The Commissioner is authorized to cancel any certificate of citizenship or any copy of a declaration of intention or certificate of naturalization heretofore or hereafter issued by the Commissioner or a Deputy Commissioner if it shall appear to the Commissioner's satisfaction that such document was illegally or fraudulently obtained from the Commissioner or a Deputy Commissioner; but the person to whom such document has been issued, shall be given at such person's last known place of address, written notice of the intention to cancel such document with the reasons therefor and shall be given at least sixty days in which to show cause why such document should not be canceled. The cancellation of any such document shall affect only the document and not the citizenship status of the person in whose name the document was issued."

Title 5 U.S.C.A., Section 1001 (c), provides that:

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making"

means agency process for the formulation, amendment, repeal of a rule.”

Title 5 U.S.C.A., Section 1009 (a) (b) (c) (e), provides:

“Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action, within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

“The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.”

“Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a de-

claratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.”

“So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action . . . found to be . . . (3) in excess of statutory jurisdiction, authority, or limitations. . .”

Title 28 U.S.C.A., Section 2201, provides that:

“In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

Part 385 of Title 8 C.F.R. Revocation of Records Created and of Naturalization and Citizenship Documents issued by the Commissioner:

- A. 385.1 Report and Notice. “If at any time after certification of lawful entry has been issued, under part 362 of this chapter, or a certificate of naturalization has been issued, under part 378 * * * evidence becomes available indicating that such record or document was obtained illegally or fraudulently

complete report shall be promptly submitted to the Central Office or the appropriate Director with comment and recommendation; if the Commissioner or Deputy Commissioner is satisfied that a prima facie showing has been made that such record or document was obtained illegally or fraudulently he shall cause such District Director to have served * * * notice * * * that proceeding has been instituted to cancel the record or document * * * .”

- B. 385.2 Answer. * * * Upon receipt of such response or answer or upon expiration of time allowed for showing good cause the record shall be closed and forwarded to the Commissioner accompanied by findings of fact, conclusions of law and the recommendation of the official assigned * * * together with comment and recommendation of the District Director.”
- C. 385.3 If the Commissioner finds the record or document, or both, were procured illegally or through fraud he shall cancel ab initio such record or document or both.”

STATEMENT

The appellee does not controvert the appellant's statement of the case appearing on page 5 of Brief for Appellant.

ARGUMENT

The appellee agrees with the appellant that all of the errors assigned by the appellant are based on the

right of the Commissioner to direct the appellant to hold the hearing. The appellee does not agree that to determine the issues on this appeal it is necessary to assume that the record of registry and certificate of lawful entry were procured by false statements. There is no necessity to assume any such fact. That is not material here. It is true that appellee's complaint states that that is the ground upon which appellant is threatening to proceed with the hearing. However, the basis of appellee's actions to restrain the appellant from proceeding with the hearing *because he is acting beyond the scope of his authority under any law of the United States*.

The appellee admits that under the statutory provisions only the Commissioner is authorized to grant an application for registry, to issue a certificate of lawful entry and to issue a certificate of arrival. The regulation adopted by the Commissioner unlawfully purports to empower the Commissioner to cancel such documents, but the appellee contends that such regulation is beyond the scope of the statute and confers no power or authority upon the appellant to hold any hearing or do any thing, or take any action seeking to cancel the certificate of lawful entry.

The regulations under which the appellant purports to act profess to have been issued in pursuance of Title 8 U.S.C.A., Section 727. The scope of any regulations with respect to certificates issued by the Commissioner is limited and defined by Title 8 U.S.C.A., Section 740. That section prescribes the power of the Commissioner with respect to cancellation of certificates. Nowhere in that section is the Commissioner given power to cancel any certificates other than those specified therein; certificates of law-

ful entry and records of registry are not mentioned specifically, nor by implication in that section. The regulation promulgated and referred to as Part 385 of Title 8, C.F.R. can confer no power not authorized by the statute as stated by the Judge of the District Court in the memorandum opinion appearing in the transcript in this case on Page 25 as follows:

“It will be noted that the Act does not in terms authorize the Commissioner to cancel records of arrival or certificates of lawful entry. Counsel for the Government contend that power to do so may be implied from the authority specifically granted. I do not think so. In *Stark v. Wickard*, 32 U.S. 288, 309, the court said:

“When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of these agencies is circumscribed by the authority granted.”

See also *Arrow-Hart & H. Co. v. Commissioner*, 29 U.S. 587, 598. As express authority was by Congress limited to cancellation of certificates of citizenship, copies of declarations of intention to become citizens, and certificates of naturalization, the Commissioner is not authorized to cancel the registry or certificate mentioned in the complaint.”

It should be observed that the power to cancel other documents issued under subchapter 3 of the Nationality Act is reposed in the courts. Title 8 U.S.C.A., Section 738 (a).

The regulation challenged by the appellee is within the definition of a “rule” contained in Title 5, U.S.C.A., Section 1001 (a). With respect to the illegality of the regulation there is no administrative remedy to be exhausted. The unlawful exercise

of authority by an administrative body may be challenged in any court of competent jurisdiction. Title 5 U.S.C.A., Section 1009 (a), (b), (c), (e). A local federal officer acting under color of his office and beyond the scope of his authority may be restrained immediately from so acting without the necessity of a complaining party joining his superior as a party to the action. This proposition of law was reviewed and carefully analyzed by this Circuit Court of Appeals in the case of *Neher v. Harwood*, 128 Fed. (2d) 846. The case is reported in 158 A.L.R., Page 1116 and is thoroughly annotated in said volume at Page 1126.

This is a proper proceeding for the appellee to seek a declaratory judgment under Title 28 U.S.C.A., Section 2201 and to seek an injunction because of the irreparable injury he will suffer in the event the unlawful proceedings sought to be carried out by the appellant are not stayed. The appellee has no administrative remedy. The administrative body is acting beyond its power. If it is permitted to act it may deprive the appellee of his statutory right to have a court pass upon his qualifications to be admitted to citizenship, Title 8 U.S.C.A., Section 734 (a). No such a hearing can be accorded him without a certificate of arrival, Title 8 U.S.C.A., Section 732 (c). The certificate of arrival is only issued where there is a record of registry, Title 8 U.S.C.A., Section 729 (a). The record of registry has been made and the certificate of lawful entry issued. Title 8 U.S.C.A., Section 728. If the appellee is not eligible to citizenship in the judgment of the Commissioner of Immigration and Naturalization, the Commissioner may show that fact to the naturalization court

at the appropriate hearing, Title 8 U.S.C.A., Section 734 (a). The record of registry and the certificate of lawful entry and the certificate of arrival will not bar such a hearing and will not prevent an inquiry into those facts before a court of competent jurisdiction at a time and place provided therefor by Congress. Should the Commissioner seek to deport the appellee, the record of registry would not bar that proceeding. If the appellee is unlawfully in the United States, irrespective of whether a record of lawful entry has been made or not, Congress has provided that he may be deported, Title 8 U.S.C.A., Sections 155 and 214. The establishment of the record of registry and certificate of lawful entry merely entitle the appellee to have the Commissioner issue to the Clerk of the Naturalization Court a certificate of arrival which is prerequisite to the filing of a petition for naturalization, Title 8 U.S.C.A., Section 732 (c), upon which a hearing as to the good moral character of the appellee may be had, Title 8 U.S.C.A., Section 734 (a). In order that the appellee may have such a hearing there is a vital necessity for a determination of his rights at this time.

If the Commissioner so long ago as April 17, 1941 improvidently issued the certificate of lawful entry and made a record of registry the government has not been prejudiced and has ample opportunity to protect itself. It can urge its contentions by resisting the petition for naturalization or it may bring a direct proceeding seeking the deportation of the appellee. The record of registry is not a bar to any inquiry into the alien's right to remain in the United States, return thereto, or be admitted to citizenship. Re-entry permits under Title 8, U.S.C.A., Section 210 have

the same status as the record of registry and certificate of lawful entry here sought to be cancelled. Without citing authorities in support thereof, it should be stated that such certificates may be disregarded at any time when an alien presents himself for readmission and an inquiry may be conducted into his right to return to the United States; if he is admitted on such a permit, an inquiry as to his right to remain in the United States may be had by deportation proceedings at any time; likewise if he obtained the record of registry and certificate of lawful entry because of his failure to be of good moral character, an inquiry into his good moral character can be made at any time *in a naturalization proceeding before the court*, Title 8 U.S.C.A., Section 734. The only purpose the record of registry serves is to authorize the Commissioner to issue the certificate of arrival prescribed in Title 8 U.S.C.A., Section 732 (c). The statute was passed in recognition of the knowledge that many aliens had been admitted into the United States lawfully and that because of human error in handling so many thousands of people a record of the admission could not be located; as a means of permitting such persons who had entered the United States in past years to seek naturalization, Congress provided for the legalization of their residence for naturalization purposes as set out in Title 8 U.S.C.A., Section 728, so that persons who were lawfully entitled to remain in the United States could comply with Title 8 U.S.C.A., Section 732 (c) at the time of filing petitions for naturalization.

The appellant is correct when he states that the only reported case is the case of *Dopico v. Revell*, 73 Fed. (2d) 221, wherein a certificate of registry was

cancelled by the Commissioner. It is pointed out, however, that the case referred to arose out of a writ of habeas corpus instituted to prevent the deportation of the petitioner. The validity of the cancellation of the certificate of lawful entry upon the basis that the Commissioner was without power to cancel such a certificate was not before the court. As the court pointed out, in considering the legality of the cancellation the court only considered the question of a fair hearing. The power of the Commissioner to cancel does not appear to have been raised. The only matter the court had before it was the fairness of the hearing. Actually, whether the certificate of registry was cancelled or not in that case, made no difference. The matter was simply a matter of deportation and the certificate of registry could have been disregarded. It is submitted that the citation referred to is of no help to the court in this matter.

CONCLUSION

It is respectfully submitted that:

1. Judge Holly correctly stated the law in his opinion in this language (TR 25):

“As express authority was by Congress limited to cancellation of certificates of citizenship, copies of declarations of intention to become citizens, and certificates of naturalization, the Commissioner is not authorized to cancel the registry or certificate mentioned in the complaint.”

Regulation Part 385, Title 8 C.F.R., should therefore by this Court be held to be invalid insofar as it purports to confer any power upon the Commissioner to cancel a record of registry and certificate of lawful

admission and any power upon the appellant to do anything to that end under such regulation.

2. The Commissioner is not a necessary party as stated by Judge Holly in the transcript in this case on Page 26, in this language:

“... where the complaint is that the superior officer is abusing a discretion legally vested in him he is a necessary party to the action, but where it is charged and the question for determination is whether the order of the superior is beyond his authority, the superior is not a necessary party. That is the situation here.”

3. The action is not premature since the appellee has no adequate remedy against the unlawful act of the appellant.

4. The appellee has no adequate remedy at law, although the appellant has no adequate remedy available to him if anything is attempted to be done by the appellee under the record of registry and certificate of lawful admission.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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